IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 51 of 2004
In
COMPANY APPLICATION No. 445 of 2000
In COMPANY PETITION No. 121 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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O.N.G.C. LTD. - Appellant(s)

Versus

O.L. OF AMBICA MILLS CO. LTD. & 11 - Opponent(s)

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Appearance :

MR. KAMAL TRIVEDI, LD. ADDL. ADVOCATE GENERAL WITH

MR. K.M. THAKAR, LD. ADVOCATE FOR THE APPELLANT

MR RM DESAI for Opponent(s) : 1,
MR JT TRIVEDI for Opponent(s) : 2,
MR PRANAV G DESAI for Opponent(s) : 3,
NOTICE SERVED for Opponent(s) : 4 - 5, 7, 12,
MR NAVIN K PAHWA for Opponent(s) : 6,
MR. MIHIR JOSHI, LD. SR. ADVOCATE WITH

SINGHI & CO for Opponent(s) : 8,
NOTICE SERVED BY DS for Opponent(s) : 9,

MR DS VASAVADA for Opponent(s) : 10,
MR SK JHAVERI for Opponent(s) : 11,
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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 16/01/2006

C.A.V. JUDGEMENT:

(Per : HONOURABLE MR.JUSTICE K.M.MEHTA)

Oil and Natural Gas Corporation Ltd. (hereinafter referred to as “ONGC”) appellant (original applicant) has filed this appeal under Section 483 of the Companies Act, 1956 (hereinafter referred to as “the Act”) challenging the judgment and order passed by the learned Single Judge whereby the application being Company Application No. 445 of 2000 in Company Petition No. 121 of 1995 preferred by the appellant has been rejected.

2. The facts giving rise to this appeal are as under:

BACKGROUND OF THE MATTER:

2.1 ONGC was initially a department of the Government of India but, in view of its expanding activities in the search for strategic and vital materials like oil, petroleum and its products it was set up as a body corporate. It is now a statutory corporation constituted by and under the Oil and Natural Gas Commission Act (Central Act 43 of 1959, hereinafter referred to as “the Act”). The Act provides for the establishment of a Commission “for the development of petroleum and petroleum products produced by it and for matters connected therewith”. Section 2(f) of the Act defines “petroleum” as having the same meaning as in the Petroleum Act, 1934 (Act 30 of 1934) and as including “natural gas”. The Commission established under the Act took over the previously existing organization with effect from September 18, 1959.

2.2 In the course of its drilling and exploration of oil, ONGC discovered oil-bearing fields in Cambay and Ankleshwar region in 1959 and 1961 respectively. In most of the oil fields situated in Gujarat, gas comes out along with crude oil and is commonly known as “associated gas”. In Cambay area, gas is unaccompanied by crude oil and is known as “free gas”. This is easily combustible and can be used as domestic as well as industrial fuel. We are concerned here with both these commodities which are generally known as “natural gas” and we shall refer to them compendiously as “gas”.

2.3 At that time, there were very few industries set up in and around Vadodara and these depended, besides electricity, on other forms of energy generated through coal or furnace oil. In July 1967, the supply of gas to some of these industries in and around Vadodara city was started, initially as a temporary measure pending

the effective materialisation of the Gujarat Fertilizer Corporation demand, after which the industries were to go over to fuel oil if gas could no longer be supplied. After a series of discussions, the Federation of Gujarat Mills and Industries agreed to a price of Rs. 100/- per unit of Ankleshwar gas for this supply. Among the industries that thus received gas supply were originally some ten respondents in appeal before the Supreme Court (respondents 2 to 10 in these appeals) who have formed themselves, in September, 1978, into an association called “The Association of Natural Gas Consuming Industries of Gujarat” It may be noted that out of 10 respondents we are concerned with Ambica Mills respondent No. 1 only which has gone in liquidation and therefore the Official Liquidator of High Court is representing it. The supply to these industries – extended later to a few more – was based on individual contracts entered into with each one of the concerns. Initially, ONGC

entered into contracts valid for a period of five years at a time but, subsequently – it is said, due to fear of possible shortage in the availability of enough gas – this was changed and the contracts were, generally, made annual, except in regard to certain public sector undertakings and, it is said, a few companies. The rates of supply were also slowly stepped up as can be seen from the following table:

Period	Price of supply
January 1, 1976 to March 31, 1976	Rs. 322.63
April 1, 1976 to December 31, 1976	Rs. 341.45
January 1, 1977 to March 31, 1977	Rs. 351.00
April 1, 1977 to December 31, 1977	Rs. 371.16
January 1, 1978 to March 31, 1978	Rs. 382.15
April 1, 1978 to March 31, 1979	Rs. 504.00

2.4 According to ONGC, the price demanded

from these industries had initially been based on alternative fuel cost i.e. the cost which these industries would have had to pay for fuel oil if no supply of gas had been available. Later upto December, 1975, the price was based on the cost of production, as determined by the award. After the expiry of the contract, a new contract stipulated prices for supply that were prevalent at the time of the respective contracts. As the said price was heavy, industries were not satisfied.

2.5 In view of the rise in price, an association of gas consumers was formed and ultimately a society registered under the Co-operative Societies Act. They filed petition before this Court being Special Civil Application No. 833 of 1979 and others praying to issue appropriate writ directing the respondent to supply the break-up and data on the basis of which price structure was arrived at by O.N.G.C.,

for supply of the gas etc. These matters were finally decided by a Division Bench of this Court. The judgment is reported in 24(2) GLR 1437 in the case of Association of Natural Gas Consuming Industries of Gujarat and Ors. Vs. O.N.G.C. & Anr. In para 36 of the judgment on page 1460 the Division Bench has given certain directions and in para 37 of the judgment the Division Bench set aside the price demanded by O.N.G.C., leaving it open to deal with the question of price fixation in any one of the three modes suggested in para 36. The petition was, therefore, partly allowed and rule was made absolute accordingly in the petitions with costs.

2.6 Being aggrieved and dissatisfied with the said judgment, O.N.G.C., preferred appeal before the Hon'ble Supreme Court. During the pendency of the petition, various orders were passed by the Hon'ble Supreme Court. However, on 15.4.1987 the Hon'ble Supreme Court was pleased to pass the

following interim order:

2.6A "We direct that during the pendency of the appeals, the Oil and Natural Gas Commission will not disconnect the supply of gas to the respondents, namely, the Association of Natural Gas Consuming Industries of Gujarat, M/s. Jayant Paper Mills Ltd., M/s. Alembic Glass Industries Ltd., M/s. Alembic Chemicals Works Company Ltd., Shri Dinesh Mills Limited, M/s. Sarabhai Common Services, M/s. New India Industries Limited, Punjab Steel Rolling Mills Private Ltd., Chandan Metal Products Ltd., and Shri Ambica Mills Ltd. Mill No. 2 and will continue to supply gas as hitherto, charging at the rate of Rs. 1,000/- for one thousand cubic meters subject, however, to the undertaking by the respondents which has been given and has been accepted here, that the said

respondents will not charge encumber or alienate, except with the leave of this Court, any of their immovable assets included in the respective undertakings and that they will make their immovable assets, available for discharging the respective liabilities on account of the difference in the price of all the gas supplied to them and further during the pendency of the appeals as determined by order made by the Court while disposing of the appeal. The undertaking will be filed within four weeks from today."

2.6B As far as the present appeal is concerned, we are concerned with the case of Ambica Mills which has been represented through the Official Liquidator, respondent No. 1.

2.7 Pursuant to the aforesaid order of the Hon'ble Supreme Court dated 15.4.1987, an

undertaking was given by Ambica Mills to the aforesaid effect on 27.5.1987 and therefore supply of gas to the Unit was continued. Paragraph 3 and 4 of the undertaking read as follows:

2.7A "para 3 – I state that respondent No. 10 company undertakes that none of immovable assets of the company will be further charged and encumbered hereafter with effect from 15.4.1987, i.e. from the date of order of this Hon'ble Court except with the leave of this Hon'ble Court.

2.7B Para 4 - I state that respondent No. 10 Company further undertakes not to alienate any of its immovable assets hereafter with effect from 15.4.1987 except with the leave of this Hon'ble Court. The respondent No. 10 company

further undertakes to make available all its immovable assets in the event of discharging the liabilities which may arise on account of the difference between the price at which all the Gas being supplied in the company during the pendency of the proceedings in this connection and the price which may be determined by this Hon'ble Court while disposing of the present appeals finally."

2.8 Thereafter, the matter was heard by the Hon'ble Supreme Court finally. The Hon'ble Supreme Court delivered the final judgment on 4.5.1990 (since reported in 1990 Supp) SCC 397). The Hon'ble Apex Court, as regards the price fixation, had set aside direction given in para 36 of the judgment of the High Court. The Hon'ble Supreme Court did not approve the same and ultimately in para 40 sub-para (viii) on page 440

of the judgment the Hon'ble Supreme Court has given certain directions by observing as under:

2.8A "(viii) On behalf of the ONGC, it has been pointed out that a sum of Rs. 14.35 crores is outstanding for the period from December, 1982 to August, 1989 from eighteen concerns, even on the basis of the interim prices at which the ONGC has been supplying them gas under the orders of this Court, primarily due to shortfalls in the guaranteed offtake and that four concerns, who have stopped taking supply of gas, are in arrears to the tune of about Rs. 12 lakhs. We need hardly say that the ONGC will be at liberty to take immediate steps to recover the charges due from the respondents in the light of this judgment."

2.9 After the aforesaid judgment of the Hon'ble Supreme Court, it appears that ONGC has filed application for certain directions and modification of the aforesaid final judgment of the Hon'ble Supreme Court. From the record it appears that the matter was taken up by the Hon'ble Apex Court on 8.12.1992 (page 142 of the paper book) and at that time the learned senior counsel on behalf of the Association of Natural Gas Consuming Industries submitted that these members (respondents in appeal) will make some more substantial payment to the ONGC by the end of the month and the particulars of payment so made would be submitted in the Court on or before 8.1.1993. Thereafter, the matter was again taken up for hearing before the Hon'ble Supreme Court on 6.4.1993 wherein ONGC filed application for certain directions on account of non-payment by the industries (respondents in the appeals) of their dues for the period prior to 29.1.1987 remaining unpaid on account of certain orders

made during the pendency of the appeals of which the respondents have taken full benefit. From the said order it appears that in that order passed on 6.4.1993 the Hon'ble Apex Court observed that the liability of these respondents to make the payment of the amounts due from them to the ONGC, as a result of benefit of stay orders obtained by them giving the requisite undertaking, is beyond controversy and cannot be disputed (order of the Hon'ble Supreme Court on page 144 relevant page 146). In that order the liability of the present respondents is shown on page 151. In the said order it is observed that principal amount due from Ambica Mills as on 31.3.1993 in respect of 1.4.1979 to 21.1.1987 as shown in the statement furnished by ONGC is Rs. 1.58 crores and interest calculated thereon by ONGC amounted to Rs. 4.96 crores. On behalf of Ambica Mills the principal amount is admitted while interest calculated by ONGC is subject to verification (page 151 of paper book). It may be noted that at

that time the company was before BIFR.

2.10 It may be noted from the record that the Hon'ble Supreme Court by its order dated 29.4.1993 (page 154 of the paper book) granted the prayer of ONGC that ONGC would also be entitled to take steps regarding disconnecting the supply of gas.

2.11 From the record it appears that the matter was again heard by the Hon'ble Supreme Court on 10.8.1993, by that time as far as the present respondents are concerned, BIFR order was already obtained on 28.5.1993 and after obtaining order from the BIFR the learned counsel for the present respondents made a statement that the liberty be granted for sale not only of Vatva land but also Unit No. 1, at Kankaria referred to in the order of BIFR to enable the company to first pay entire dues of the ONGC and thereafter utilize the remaining surplus for other purposes

as mentioned in the order of BIFR and the Hon'ble Supreme Court has accepted the submission of the learned counsel for the respondent in this behalf and accordingly the Hon'ble Supreme Court has granted the liberty to the company to take necessary steps in accordance with the orders of the BIFR for sale of Vatva land as well as properties described as Unit No. 1. The Hon'ble Supreme Court observed that the entire dues of the ONGC shall be first paid out of the total sale price and the balance, if any, remaining thereafter shall be available for utilization in any other manner directed by the BIFR.

2.12 It appears that meanwhile BIFR has opined that the Company may be required to go in liquidation. Pursuant to the aforesaid order of BIFR and as some winding up petitions were filed before this Court, from the record it appears, this Court passed order on 17.10.1997 for winding up of Ambica Mills in Company Petition No. 66 of

1988 and others including Company Petition No. 121 of 1995 being Board Opinion under Section 20 of SICA. This Court had appointed Provisional Liquidator also.

2.13 Thereafter again the matter reached before the Hon'ble Supreme Court and the Hon'ble Supreme Court in the course of hearing of various interim applications filed by the parties for appropriate directions, passed order holding, inter alia, that out of the assets of the company under liquidation on 17.10.1997, the dues of ONGC are required to be paid of first and the question of making any payment to any other creditor can arise only out of surplus, if any,remaining after the payment of full dues of the ONGC. The order of the Hon'ble Supreme Court dated 17.10.1997 reads as under:

2.13A “All that is necessary to be said is that out of the assets of the Company

under liquidation, the dues of ONGC Ltd., are required to be paid off first and the question of making any payment to any other creditor can arise only out of the surplus if any remaining, after the full dues of the ONGC Ltd., have been paid off. The High Court is, therefore, to proceed with the matter in this manner. IAs stand disposed off.”

2.14 From the record it appears that after the aforesaid order dated 17.10.1997 was passed by the Hon'ble Supreme Court, Textile Labour Association has filed Review Application before the Hon'ble Supreme Court to review the order dated 17.10.1997 and the Hon'ble Supreme Court heard the matter filed by the Textile Labour Association and in Review Petition Nos. 1193-1203 of 2001 in I.A.Nos. 168-178 of 1997 in Civil Appeal No. 8530-40 of 1983 in the matter of Textile Labour Association Vs. The Official

Liquidator and Anr., since reported in [(2004) 9 SCC 741]= 120 Com. Cases 505, a three Judge Bench of the Hon'ble Supreme Court (Coram: S. Rajendra Babu, Dr. A.R. Lakshmanan and G.P. Mathur, JJ) considered its various earlier judgments and also Section 529 and Section 529A of the Companies Act and ultimately observed as under: (pages 56-57 of the paper book) (120 Com. Cases 505 the judgment was delivered on 12.4.2004) (relevant page No. 509/510):

2.14A “The effect of Sections 529 and 529A is that the workmen of the company become secured creditors by operation of law to the extent of the workmen's dues provided there exists secured creditor by contract. If there is no secured creditor then the workmen of the company become unsecured preferential creditors under Section 529A to the extent of the workmen dues. The purpose of Section 529A is to

ensure that the workmen should not be deprived of their legitimate claims in the event of the liquidation of the company and the assets of the company would remain charged for the payment of the workers' dues and such charge will be pari passu with the charge of the secured creditors. There is no other statutory provision overriding the claim of the secured creditors except Section 529A. This section overrides preferential claims under Section 530 also. Under Section 529A the dues of the workers and debts due to the secured creditors are to be treated pari passu and have to be treated as prior to all other dues.

2.14B “Therefore, the law is clear on the matter as held in UCO Bank's case that Section 529A will override all other claims of other creditors even where a

decree has been passed by a Court”.

2.14C It may be noted that the Hon'ble Supreme Court has considered its earlier judgments in the case of UCO Bank Vs. Official Liquidator reported in 1994(5) SCC 1; Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies & Ors. 1996(4) SCC 165; Allahabad Bank vs. Canara Bank & Anr. 2000(4) SCC 406 and A.P. State Financial Corporation Vs. Official Liquidator 2000(7) SCC 291 and thus held as follows:

2.14D Therefore, claims, if any, of ONGC will have to be worked out in accordance with Sections 529 and 529A of the Companies Act as well. The contention advanced on behalf of ONGC by Shri Raju Ramachandran that if a mandamus had been issued, it will prevail over any law is not tenable

and is rejected.

2.14E In the result, we make it clear that order made by this Court on 17.10.1997 in I.A. No. 168-178/1997 in Civil Appeal No. 8530-40/1983 will have to be read subject to provisions of Sections 529 and 529A of the Companies Act.

2.14F The Review petitions stand allowed in the manner stated above."

2.15 Thereafter, in Company Application No. 445 of 2000 in Company Petition No. 121 of 1995 filed by ONGC seeking direction for payment to ONGC from the sale proceeds available from the sale of the assets/properties of the Ambica Mills Ltd. (in liquidation), several prayers were made by the applicant in which it was prayed that this Court may be pleased to direct the respondent to make payment to the applicant ONGC towards the

outstanding dues amounting to Rs. 1799.367 lakhs as on 28.2.1998 with further interest thereon till the date of payment/till the date of realisation for natural gas supplied to M/s. Ambica Mills Company Limited (in liquidation). The petitioner further prayed for direction to grant injunction restraining the respondent and/or his agents, officers, servants from making any payment/disbursement in any manner out of any of the sale proceeds that are available from the sale of assets/properties of M/s. Ambica Mills Company Ltd. (in liquidation).

2.16 The matter was heard at length and the learned Single Judge by his judgment and order dated 1.10.2004 in paragraphs 39 and 40 observed as under: (pages 41-42 of the paper book).

2.16A “ONGC therefore cannot claim any preferential right on the basis of the order of 17.10.1997 in priority to the

secured creditors and the workmen taking into consideration the provisions of Sections 529 and 529A of the Act. Such preferential claim, if falling under Section 530 of the Act would follow the claims of Secured Creditors and the Workmen under Sections 529 & 529A of the Act. In case the claim of ONGC is not proved to be preferential under Section 530 of the Act they would therefore fall for consideration along with all other claims of other creditors as ONGC, on its own saying, is a decree holder.

2.16B In view of what is stated hereinbefore this application cannot be granted at this stage, i.e. before claims of Secured Creditors and workmen are processed under Sections 529 & 529A of the Act. Despite categorical statement at the Bar, under instructions, that ONGC did not want to

lodge any claim before the Official Liquidator, it will be open to ONGC to lodge its claim in accordance with law and seek its satisfaction when claims of other Creditors of the Company in liquidation are taken up for consideration for distribution of the funds which may be available at that time. The application is accordingly rejected. Notice is discharged."

2.17 Being aggrieved and dissatisfied with the aforesaid judgment dated 1.10.2004, ONGC has filed the present O.J. Appeal No. 51 of 2004 which was admitted and order was passed on the Civil Application on 18.10.2004 staying the impugned judgment/order subject to disbursement to the workers at the rate of Rs. 2500/- to each worker as agreed by the parties.

3. Mr. Kamal Trivedi, learned sr. advocate

and Additional Advocate General with Mr. K.M. Thakar, learned advocate and Mr. Ajay R. Mehta, learned advocate in cognate matters appear on behalf of the appellant. On behalf of the Official Liquidator Mr. R.M. Desai, learned advocate appears. For Bank of India Mr. J.T. Trivedi, learned advocate appears. On behalf of respondent No. 3 Mr. Pranav G. Desai, learned advocate appears, Respondent Nos. 4, 5, 7, 12 are served but nobody appears on their behalf. For respondent No. 6 Mr. Navin Pahwa, learned advocate appears. For respondent No. 8 Mr. Mihir Joshi, learned sr. counsel with Singhi & Co., appears. On behalf of L.I.C., nobody appears. Mr. Vasavada, learned advocate appears on behalf of Textile Labour Association. On behalf of Mazdoor Sabha, Vatva, Mr. S.K. Jhaveri, learned sr. advocate appears.

CONTENTION OF LEARNED SR. ADVOCATE MR. KAMAL TRIVEDI WITH MR. K.M. THAKAR AND MR. AJAY R.

MEHTA, LEARNED ADVOCATE FOR THE APPELLANT:

3.1 Mr. Kamal Trivedi, learned sr. advocate and Additional Advocate General with Mr. Ajay R. Mehta, learned advocate, has argued the matter at length on behalf of the appellant.

FACTUAL BACKGROUND OF THE MATTER AND CONTENTION BASED THEREON:

3.2 The learned counsel has invited our attention to the facts which we narrated earlier in this behalf. He has explained the background of the matter in which the petition before this Court was filed and thereafter the appeal was filed before the Hon'ble Supreme Court. He has invited our attention to the order passed passed by the Hon'ble Supreme Court directing the respondent to give undertaking and in response to the same undertaking has been given.

3.3 The learned counsel further submitted that in this case the price is to be recovered right from 1975 and the petition was filed in 1979 and ultimately a decision was given by this Court in 1983. Thereafter, though the respondent succeeded in High Court but in appeal of ONGC before the Hon'ble Supreme Court, the Hon'ble Supreme Court has passed categorical order and pursuant to that undertaking was also given by the respondents in the appeal before the Hon'ble Supreme Court. The judgment of the Hon'ble Supreme Court was delivered on 4.5.1990. On that day onwards, the respondents were liable to pay the amount of gas which they have consumed. That amount was crystallized and 0NGC was in place of decree holder and the respondents were bound to pay the said amount.

3.4 It was further submitted that in view of the order of the Hon'ble Supreme Court and in view of the sale of gas made by ONGC during the

period in question, ONGC has to receive from and be paid by the said company i.e. the company now in liquidation, an amount of Rs. 1799.367 lakhs as on 28.2.1998 which has as on 30.9.2004 reached to the tune of about Rs. 37,22,52,211.20 with interest and on the said amount further interest is also payable till the date of realization and ONGC is entitled to claim and receive the aforesaid amount with further interest till the date of actual payment.

3.5 It was further submitted that the aforesaid application No. 445 of 2000 was filed somewhere in December, 2000 and at that time the amount mentioned / claimed therein was Rs. 1799.367 lakhs as on 28.2.1998 with further interest thereupon till the date of payment/till the date of realization and ONGC is required to be paid its dues in entirety first/prior in point of time and before payment of any amounts to other secured creditors and only after the

payment of the entire dues of ONGC are cleared, can there arise any question of any payment to the other creditors including the other secured creditors, workmen etc., and opponent Nos. 2 to 10.

3.6 In this case winding up order was passed in 1997. So prior to 1997 the liability of the respondents to ONGC was unequivocal and they were liable to pay under the law particularly when they have given undertaking. The subsequent event of winding up and order of the Hon'ble Supreme Court thereafter may not have any impact on the liability of the respondents. The learned counsel further submitted that ONGC was and has been claiming that it is at least at par with status conferred on a secured creditor and it is also a creditor secured by the orders of the Court and had preference in payment to the secured creditors until its dues are paid and in any case it is entitled to equal share from the amounts

distributed/paid and that such aspect was also recognized by the Hon'ble Supreme Court even in the order dated 12.4.2004. The ONGC had, without prejudice to other contentions, submitted that in the light of he said judgment dated 12.4.2004, ONGC is at least entitled to pro-rata share in the distribution which ought to be determined by the Court on the basis of entitlements of the ONGC , other secured creditors and the workmen.

3.7 The learned counsel further submitted that ONGC is first entitled to its dues since its right arose at a point prior in time and a right was created because of supply of gas under the directions of the Hon'ble Supreme Court. It was further submitted that neither the workmen's nor the secured creditors' right crystalisation in respect of events which had accrued much later could steal a march or have a priority merely because the company went into liquidation and provisions of Section 529 or 529A stood

attracted. It was therefore contended that such a thing would lead to an extremely inequitable situation, and, therefore, the doctrine of “actus curiae neminem gravabit” would be attracted, and the ONGC would be entitled to its dues.

3.8 The learned counsel submitted that in view of the aforesaid development of the matter ONGC would be a secured creditor of the Company in liquidation as security in favour of the appellant was created by various orders of the Hon'ble Supreme Court particularly the order dated 15.4.1987. The orders per se create security in favour of the appellant. The need for creation of such security was the fact that the appellant was directed to supply gas under directive orders of the Hon'ble Supreme Court at a price lower than what was fixed by the appellant and what was actually due to it.

3.9 Before the learned counsel for the

appellant argued the matter, he made further legal submission. He had invited our attention to certain statutory provisions of the Companies Act as well as the provisions of the Insolvency Act.

3.10 One of the provisions Section 125 of the Companies Act reads as under:

> "Sec. 125 - Certain charges to be void against liquidator or creditors unless registered -
>
> (1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this Section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by

which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation."

3.11 The learned sr. counsel has relied on Section 445 of the Act which provides for filing of copy of winding up order with Registrar, Section 446 which provides stay of suits on winding up order, Section 447 which provides effect of winding up order, Section 448 which provides for appointment of Official Liquidator, Section 449 which provides for the official liquidator to be liquidator, Section 451 which provides general provisions as to liquidators. The learned counsel has relied on Section 529 which provides application of insolvency rules in winding up of insolvent companies, Section 529A which provides overriding preferential payments.

3.12 The learned counsel has relied on the provisions of the Provincial Insolvency Act, 1920, particularly Section 2(e) which provides definition of "secured creditors" which deals with Section 45 in part III Administration of Property, method of proof of debts which provides debt payable at a future time which reads as under:

> "Sec. 2(e) - "secured creditors" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor"

Section 45 of the Provincial Insolvency Act, 1920 reads as under:

"Debt payable at a future time – A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it

were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted."

3.13 The learned counsel has also relied on Section 47 of the Insolvency Act which provides Secured Creditors. Section 47(1) reads as under:

"Where a secured creditor realises his security he may prove for the balance due to him; after deducting the net amount realised."

3.14 After relying on these statutory provisions, the learned counsel made submission as to why ONGC to be treated as secured creditor.

3.14A The appellant who was under no obligation to supply gas at a rate lower than that fixed by it was virtually compelled to supply gas at a price lower than fixed by it. The Hon'ble Supreme Court was therefore aware that the appellant was being placed into a disadvantageous position and therefore found it necessary to protect the appellant's interest in the case of its ultimate success vis-a-vis its entitlement to price of gas. It is in such circumstances that the order of 15th April, 1987 came to be passed and the said order has to be deemed as a creation of a procedural security/court ordered security in favour of the appellant. The same, therefore, is adequate for the appellant being considered a secured creditor entitled to a pari passu charge with other secured creditors and workmen.

3.14B This fact is also recognized by the

Hon'ble Supreme Court in final judgment dated 4.5.1990 while deciding the matter in favour of the appellant whereby the challenge of the gas consuming industries was turned down and fixation of price of gas by the appellant was upheld. Due to the aforesaid, a right as secured creditor and protected by the Hon'ble Supreme Court's order dated 15th April, 1987 came to the fore entitling the appellant to recover difference in price of gas as fixed by it. Right of the appellant protected and secured stood crystallized entitling the appellant to claim the same without any fetter whatsoever.

3.14C Creation of a security other than a contractual security which would be under Section 125 of the Act exists even statutorily and is also recognized by various judgments.

3.14D These are all examples of creation of procedural securities/Court created securities

which would be enforceable irrespective of any change of status that the defendant/appellant might have undergone.

3.14E In light of the aforesaid statutory provisions as well as the judgments referred to in the present case also a security stands created in favour of the appellant by the orders of the Hon'ble Supreme Court under which supply of gas had been undertaken by it. The appellant therefore is required to be deemed as a secured creditor entitled to its dues.

IN SUPPORT OF THE ABOVE SUBMISSIONS THE LEARNED COUNSEL RELIED UPON the FOLLOWING AUTHORITIES:

3.14F The Queens Bench in three judgments namely, 1897 (2) Queens Bench page 571 in Re Gordon; 1900(2) Queens Bench page 211 in Re Ford Ex-party the Trustee as well as 1985(1) Queens Bench page 1038 in W.A. Sherratt Ltd. Vs. John

Browley (Church Stretton Ltd.) have held that a procedural security would stand created upon orders being passed by a court and in case the defendant becomes bankrupt or goes into liquidation, the plaintiff would stand protected and secured and would not be affected by the defendant's bankruptcy or liquidation, as the case may be.

3.14G In the case of Hukmichand and another Vs. Pioneer Mills Ltd., reported in AIR 1927 Oudh page 55, it is held that an agreement or a promise to perform a particular deed namely, an agreement for creating a mortgage for loan of money would create a charge in favour of a plaintiff against the assets of the company and even though such a charge may not have been registered under the provisions of Section 109 of the Indian Companies Act, 1913 (Section 125 of the Companies Act, 1956). The said charge would be a security in favour of the plaintiff and the

plaintiff cannot be treated as a holder of simple money decree entitled to claim only after distribution to the secured creditors. Thus, in the said case, it was held that a charge would stand created in favour of the plaintiff irrespective of absence of a contractual charge or its registration.

3.14H The learned counsel has also relied on the judgment in the case of U.P. Union Bank Ltd. Vs. Dina Nath Raja Ram reported in AIR 1953 All 637.

3.15 The learned counsel therefore submitted that in any view of the matter ONGC is a Secured Creditor and when the Official Liquidator disburses the amount out of realisation, the ONGC is in pari passu with the amount of workers as per Section 529A of the Companies Act and ONGC cannot become unsecured creditor and is entitled to recover the money in line with unsecured

creditor.

3.16 In support of the aforesaid submissions the learned counsel first invited our attention to the judgment of the Madras High Court in the case of K. SARADAMBAL VS. JAGANNATHAN AND BROTHERS reported in (1972) 42 Com. Cases 359 particularly on pages 362 and 363 and ultimately on page 365 the Court has observed as under:

> “Though the expression “insolvent company” is not defined, obviously it refers to a company which has been ordered to be wound up on a petition founded upon Section 433(e), that is, the company being unable to pay its debts. According to Section 529, in the winding up of such a company, the same rules shall prevail and be observed with regard to debts provable as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged

insolvent. The question is whether only the insolvency rules are applicable or all the relevant provisions of the insolvency law are applicable to a case of winding up of an insolvent company. The intention underlying Section 529 is that all the provisions of the insolvency law are applicable to the case of winding up of an insolvent company with regard to matters enumerated in Section 529. That was also the view taken by a Full Bench of the Allahabad High Court in HANSRAJ VS. OFFICIAL LIQUIDATORS, DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY CO. LTD. (AIR 1929 ALL. 353 (FB)). A similar view was taken by the Oudh Chief Court in B. ANAND BEHARI LAL VS. DINSHAW AND CO. ((1944) 12 COMP. CASES 137) ((Oudh). Thus, according to Section 529, the provisions of the insolvency law are applicable to debts provable in the winding up of an insolvent company. That takes us to the question as to what are the provisions of

the insolvency law that are applicable to a debt covered by a lien. The Provincial Insolvency Act, 1920, and the Presidency Towns Insolvency Act, 1909, define “secured creditor”. In the former Act, Section 2(e) defines that expression.”

3.17A After relying on the definition of “secured creditor” and also commentary in Palmer's Company Law, 21st edition at page 765, the learned Judge observed as under:

“On a consideration of Section 529 read with the relevant provisions of the insolvency law, I come to the conclusion that the holder of a statutory lien or the holder of a lien created by contract and registered as required by Section 125 is a secured creditor in the matter of winding up of the insolvent company with regard to, among other things, debts provable in the winding up proceedings.

The applicant-company being the holder of a statutory lien is thus in the position of a secured creditor. Though the lien to retain possession of the goods as a bailor does not confer a right of sale on the applicant-company, the applicant-company, as an unpaid vendor of the spare parts supplied, has a right for re-sale. Having regard to these circumstances, I am of the view that in the interest of justice and for the purpose of closing the administration of the insolvent-company, it is necessary that the machineries, which are in the possession of the applicant company, are ordered to be sold in public auction by the applicant company after due publicity so as to enable the applicant company to adjust its dues including the cost of sale out of the sale proceeds. If there is any balance left, it shall be paid over to the official liquidator. The application is ordered in

these terms. No order as to costs."

3.17B The learned counsel has further relied on the judgment of the Calcutta High Court in the case of PRAGA TOOLS LTD. VS. OFFICIAL LIQUIDATOR OF BENGAL ENGINEERING CO. (P) LTD., reported in 1984 (56) Com. Cases 214 in which the Court, on page 221, has held as follows:

"In my view, both the arguments of Mr. Nag with regard to the subject-matter of the decree or order and with regard to the compromise are sound and should be accepted. I hold that the security created in favour of Mr. Nag's client by the order of S.K. Roy Chowdhury J (as his Lordship then was), dated August 1, 1978, cannot be said to be unenforceable in view of the provisions of S. 17(1)(vi) of the Indian Registration Act, 1908."

3.17C Section 125 of the Companies Act refers to contractual charges which may be created by the Company itself. The same is not and does not affect any statutory or procedural charges which may be created either by operation of law or by orders of the Court. Such charges would be enforceable irrespective of their non-registration as provided for in Section 125 of the Companies Act.

4.1 The learned counsel has further relied on the judgment of the Hon'ble Supreme Court in the case of INDIAN BANK VS. OFFICIAL LIQUIDATOR, CHEMMEENS EXPORTS (P) LTD. & OTHERS reported in (1998) 5 SCC 401 in which at para 7 on page 406 the Hon'ble Supreme Court has held as follows:

> “On a plain reading of sub-section (1) it becomes clear that if a company creates a charge of the nature enumerated in sub-

section (4), after 1.4.1914 on its properties, and fails to have the charge together with instrument, if any, by which the charge is created, registered with the Registrar of the Companies within thirty days, it shall be void against the liquidator and any creditor of the company. This, however, is subject to the provisions of Part V of the Act. The proviso enables the Registrar to relax the period of limitation of thirty days on payment of specified additional fees, on being satisfied that there has been sufficient cause for not filing the particulars and instrument or a copy thereof within the specified period. Sub-sections (2) and (3) deal with repayment of money secured by the charge. Sub-section (2) provides that the provision of sub-section (1) shall not prejudice the contract or obligation for payment of money secured by the charge and sub-section (3) says that when

a charge becomes void under that section, the money secured shall become payable immediately. Though as a consequence of non-registration of charge under Part V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on a par with other unsecured creditors. It is also evident that Section 125 applies to every charge created by the company on or after 1.4.1914. But where the charge is by operation of law or is created by an order or decree of the court, Section 125 has no application."

4.2 In para 9 of the said judgment on page 407 the Hon'ble Supreme Court has further held as follows:

“In Praga Tools Ltd. Vs. Official Liquidator of Bengal Engineering Co. (P) Ltd., (1984) 56 Comp. Cases 214 (Cal)) a consent decree for repayment of money was passed against the Bengal Engineering Company on the suit filed by Praga Tools Company. The decree provided, inter alia, that in the event of non-payment of the decreed amount, the Praga Tools Company would be entitled to execute the decree and in the event of execution of the decree, the security furnished by the Bengal Engineering Company with the Registrar under an earlier order of the Court to the extent of Rs. 53,000 would continue as security for the decree. That decree was not registered. Thereafter, Bengal Engineering Company went into liquidation and its entire assets were sold by the Official Liquidator. The Praga Tools Company applied claiming to be a secured creditor to the extent of Rs. 50,000.

A learned Single Judge of the Calcutta High Court held that as the charge was created by an order of the Court, it would not require registration under Section 125 of the Companies Act and that the Praga Tools Company should be treated as secured creditor to the extent of Rs. 50,000/- and was entitled to recover the amount from the Official Liquidator. We approve the principle laid down by the learned Single Judge of the Calcutta High Court. We also make it clear that an order or decree of a court creating charge on the properties of a company has to be distinguished from a preliminary decree passed in a mortgage suit based on an unregistered charge which is hit by Section 125 of the Act. We shall advert to this aspect presently."

4.3 In para 9 the Hon'ble Supreme Court has explained the judgment of the Calcutta High Court

which we referred to earlier and ultimately in para 16 of the said judgment on page 410 the Hon'ble Supreme Court has observed as under:

> “From the above discussion, it follows that the right of the respondents including the Company represented by the Official Liquidator to deposit the decree amount was available till 28.8.1982. In other words, the right to recover the amounts pursuant to the contract-creating charge, even under the terms of the decree was available till the said date and thereafter `the matter had passed from the domain of the contract to that of judgment' “

5. The learned counsel has further relied on the judgment of the Hon'ble Supreme Court in the case of BALKRISHAN GUPTA AND OTHERS VS. SWADESHI POLYTEX LTD. AND ANOTHER reported in (1985) 2

SCC 167 in which at para 31 on page 193 the Hon'ble Supreme Court has held as under:

> “A charging order on the property or assets of the debtor is one of the modes of enforcement of a judgment or order for the payment of money to the creditor. It is, however, not a direct mode of enforcement in the sense that the creditor can immediately proceed to recover the fruits of his judgment, but it is rather an indirect mode of enforcement in the sense that it provides the creditor with security, in whole or in part, over the property of the debtor. It makes the creditor a secured creditor who having obtained his charging order must proceed, as may be necessary according to the nature of the property charged, to enforce his charge in order to obtain the actual proceeds of his charge to satisfy his judgment, in whole or in part. Subject to the

other provisions of law, a charge imposed by a charging order will have effect and will be enforceable in the same court and in the same manner as an equitable mortgage created by the debtor by writing under his hand. A short passage in Mulla's Code of Civil Procedure (14th Edn.), Vol. II at page 1510 is instructive and it reads thus:

> `There is no provision in the Code for charging orders, but on the Original Side of the High Courts, which has inherited the older jurisdiction of the Court of Chancery, it is the practice in cases where it is considered undesirable to grant immediate execution to make a charging order in the form made in the case of KEWNEY V. ATTRILL (1886) (34 Ch D 345 : 55 LT 805: 35 WR 191). When the assets require nursing, the advantage of a charging order is that it enables the

Court on the one hand to gain time and on the other hand to protect the decree-holder. It also avoids the confusion that might ensue if the Court were to allow a direct attachment while it is administering the assets of the partnership. The effect of a charging order is to constitute the decree-holder a secured creditor although he undertakes to deal with the charge subject to the further orders of the Court'.”

6. The learned counsel has further relied on the judgment of the Allahabad High Court in the case of MUNNA LALL AND SONS VS. OFFICIAL RECEIVER, JHANSI reported in AIR 1932 Allahabad 550 where definition of secured creditor was explained. He has also relied on the judgment in the case of MITTINTI NARASIMHAMURTHI AND ANOTHER VS. PANDIRI SATYANANDAM reported in AIR 1941 Madras 794 in which on page 795 the Court

observed as under:

> “We are of opinion that in this case there is no real force in the objection that the charge created by the decree is void for uncertainty or that the property to which the charge relates is not specific. That being the case, it follows that the charge given by the decree was executable and the petition ought not to have been dismissed by the Court below on the ground that the charge was not executable. No other objection appears to have been pressed in the Court below to the prayer of the appellants being granted. The appeal is therefore allowed with costs in both the Courts.”

6.1 The learned counsel has also relied on the judgment in the case of RAM NARAIN VS. RADHA KISHEN reported in AIR 1930 PC 66.

6.2 Relying upon these judgments, the learned counsel submitted that under Companies Act, mortgage not registered under Section 109 (i.e. of old Act) is not avoided altogether. Mortgage registered within extended time takes effect from the date of execution.

6.3 In view of the aforesaid authorities the learned counsel made the following submissions:

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE APPELLANT AFTER REFERRING TO ALL THOSE AUTHORITIES:

7.1 The learned counsel has relied on some of the provisions of the Code of Civil Procedure. The Civil Procedure Code envisages creation of a security for protecting the right of a plaintiff. Order 37 dealing with summary trial of suits provides that a defendant in a suit for a claim of money is liable to be subjected to conditions

for deposit of suit claim or a percentage thereof. This is a device for creating a security in favour of the plaintiff claiming an entitlement to money.

7.2 Similarly, Order 38 Rule 5 also provides for attaching property of defendant who is likely to frustrate execution of a decree by disposing of his properties. The provision stipulates an entitlement for attaching such a property to prohibit the defendant from disposing of the property and rendering the plaintiff unable to get the decree executed thus virtually creating a security.

7.3 Similarly, Order 41 Rule 3 also stipulates that an appellant seeking stay of a money decree passed against him is required to be subjected to either deposit of amount in Court or furnishing a bank guarantee for the decretal dues. The afore referred also obviously is an act

meant to protect and secure interest of the decree holder in case if upon hearing of the appeal the Court holds against the appellant.

SUBMISSION TO ASSAIL THE JUDGEMENT/FINDING OF THE LEARNED SINGLE JUDGE:

8. Further relying upon the aforesaid authorities, the learned counsel for the appellant made the following submissions and tried to demonstrate that the reasoning of the learned Single Judge of this Court in the impugned order and judgment is not correct and this Court may allow the appeal of the appellant.

8.1 It was submitted that the learned Judge failed to appreciate that there was no question of ONGC being required to show that there was a mortgage, charge or lien. Before attacking the judgment/order of the learned Single Judge, he has invited our attention to certain provisions

of Transfer of Property Act and the Companies Act particularly Section 125 of the Companies Act which provides “charge” to include mortgage in this Part. Section 58 of the Transfer of Property Act defines “mortgage”. The learned counsel submitted that Section 125 of the Companies Act provides certain charges to be void against liquidator or creditors unless registered. The learned counsel therefore submitted that orders of the Hon'ble Apex Court created a security in favour of ONGC and such security does not come within the purview of Section 125 of the Companies Act.

8.2 The learned counsel further submitted that there are various statutory provisions which provide for creation of security which are quite different from contractual securities such as mortgage, charge or lien. The learned Judge ought to have held that the order of Hon'ble Supreme Court created a security in

favour of ONGC.

8.3 It was further submitted that there can be several modes in which security can be created and one of the recognized modes is by the conditional orders of the Court. Both parties have acted on the conditional orders of the Court and if it had been contended that the effect of such orders would not create security, ONGC would not have made supplies. It was further submitted that the learned Judge failed to appreciate that Section 125 of the Companies Act would be applicable only to voluntary charges and not to security created by the Court. It was further submitted that the learned Judge has erred in coming to the conclusion that ONGC is not ready and willing to permit the Official Liquidator to enforce its pari passu charge in favour of the workmen to the extent of the workmen's portion. It is submitted that ONGC have not contended the same before the learned Single Judge either in

its pleadings or during the course of arguments and as such the contentions are misunderstood and wrongly recorded. The learned Judge ought to have appreciated that the issue was of determination as to when a right crystallized - an issue or prioritizing entitlements and that there was no question of any statutory provisions being ignored.

8.4 It was submitted that the learned Judge ought to have appreciated that ONGC's right was on account of its having supplied gas under the directives (aegis) of the Hon'ble Supreme Court's order wherein it had been directed to supply gas at a price lower than what it was entitled to, and a specific understanding and if ultimately the Court upheld the price fixation of the ONGC, it would be entitled to recover the difference in price.

8.5 It is submitted that in view of the order

of the Hon'ble Supreme Court right from 15.4.1987 ONGC has been treated as a secured creditor and that therefore ONGC should be given preferential treatment as a secured creditor and even amongst secured creditors in the matter of recovery of its outstanding dues over all other creditors who claim to be secured creditors and workmen and financial institutions. It was further submitted that the learned Judge ought to have appreciated that ONGC supplied the gas pursuant to the order of the Hon'ble Supreme Court and hence ONGC is required to be treated as preferred secured creditor and at least secured creditor in terms of Section 529/529A of the Companies Act by virtue of the conditional orders passed by this Court as well as Hon'ble Supreme Court.

8.6 The learned Judge ought to have appreciated that way back in 1993 the Hon'ble Supreme Court vide an order dated 6.4.1993 had prescribed the mode and manner in which ONGC was

entitled to recover amounts due to it from various industries including the company in liquidation and that subsequently vide an order dated 17.10.1997 the Hon'ble Supreme Court directed that ONGC was to be paid off first out of the assets of the company now under liquidation (but not in liquidation at the relevant time) and the question of making any payment to any other creditor was to arrive only out of surplus, if any, remaining after full dues of ONGC having been paid off.

8.7 It was further submitted that the learned Judge ought to have considered that even after the order of the Hon'ble Supreme Court dated 12.4.2004 (since reported in Textile Labour Association Vs. Official Liquidator (supra)) ONGC was entitled to be treated at least as secured creditor at par with secured creditors and was entitled to pro-rata share from the amount which was available for disbursement.

8.8 The learned counsel submitted that in view of the order of the Hon'ble Supreme Court, the learned Single Judge erred in holding that ONGC was required either to seek leave of the Company Court or obtain orders from the Company Court for the purpose of pursuing its legal remedies in relation to recovery of outstanding dues, once an order of winding up came to be made on 17.1.1997 in Company Petition No. 121 of 1995, more particularly in view of the fact that proceedings were pending before the Hon'ble Supreme Court since 1987 onwards and that numerous orders were passed by the Hon'ble Supreme Court in favour of ONGC.

8.9 The learned counsel further submitted that the learned Judge ought to have considered that prior to order dated 12.4.2004 passed by the Hon'ble Supreme Court, ONGC had no occasion or reason to stake claim as a Secured Creditor in

light of various orders passed by the Hon'ble Supreme Court particularly order dated 15.4.1987. The learned counsel has further submitted that the learned Judge failed to appreciate that ONGC has a superior right over secured creditors in light of various orders passed by the Hon'ble Supreme Court. It appears that the learned Company Judge has disregarded the material fact that the Hon'ble Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such an order as is necessary for doing complete justice between the parties in any cause or matter pending before it.

8.10 The learned counsel submitted that the learned Single Judge has not properly considered the provisions of the Provincial Insolvency Act, 1920 along with other authorities cited above read with the relevant provisions of the Companies Act.

8.11 The learned counsel further submitted that the learned Single Judge ought to have appreciated that in the peculiar facts and circumstances of the present case, such a view could not have been taken since ONGC had not supplied gas of its own free volition but under the orders of the Hon'ble Supreme Court (i.e. under compulsion). Such a supply could, by no stretch of imagination, be equated with the act of a businessman, unsecured creditor or a secured creditor, who of free volition and with the sole intent of earning profit, had entered into the business transaction with the company in liquidation.

8.12 The learned counsel further submitted that security in favour of ONGC had been created by this Court's order as well as order of the Hon'ble Supreme Court and after creation of such a security, charge, or lien, the same cannot be diluted or watered down or washed away on the

ground that rights of the workmen and secured creditors would have priority over the same.

8.12A In the alternative and without prejudice to the aforesaid contention, the learned Single Judge ought to have held that the ONGC had a pari passu right and therefore a pro-rata entitlement from the amounts to be distributed.

8.13 It was submitted that the learned Single Judge ought to have considered that in view of the order of the Hon'ble Supreme Court dated 12.4.2004, the claim of ONGC was required to be worked out in accordance with Section 529 and 529A as well. It was further submitted that the learned Single Judge erred in passing order dated 1.10.2004 permitting disbursement of the amounts to the workmen/union and other secured creditors/financial institutions.

8.14 The learned Single Judge has erred in

rejecting the request made on behalf of ONGC to adjourn / defer the proceedings of the application praying for disbursement. However, the request was made stating inter alia that ONGC wanted to prefer appeal against the judgment and order dated 1.10.2004 which was rejected by the learned Single Judge. The learned counsel submitted that the said denial by the learned Single Judge is unjustified and has resulted into irreparable injury to ONGC. After the order for disbursement of the amount i.e. order dated 1.10.2004 a request was made on behalf of ONGC praying, inter alia, that the said order may be stayed or it may be directed that the disbursement may not be made for about ten days so that ONGC Limited can file appeal. However, the learned Single Judge rejected the said request. It was therefore submitted that the order dated 1.10.2004 is unjustified and unsustainable in law and on facts.

8.15 The learned counsel submitted that the learned Single Judge ought to have deferred the proceedings and the order till the appeal against the order dated 1.10.2004 was filed and heard at least for interim relief. The learned counsel submitted that in facts of the present case the said order dated 1.10.2004 is unjustified and unsustainable and does not take into consideration the other/earlier orders passed in other Company Applications which orders have relevance and have bearing on the prayer and order for disbursement of the amount in favour of workmen and other financial institutions.

8.16 The learned counsel therefore submitted that the position of the appellant would not be that of a mere decree holder but would be that of a decree holder coupled with the security created in its favour by the Court's order as well as the virtual assurance which was available to it (in the form of undertaking given by respondents)

because of the Hon'ble Supreme Court's order and thus, the appellant was required to be held as a secured creditor entitled to pari passu charge along with other secured creditors and the workmen.

8.17 U.P. Union Bank Ltd. Vs. M/s. Dina Nath Raja Ram reported in AIR 1953 All 637 – provides that by reason of this Section “rules” which are in force under the law of insolvency have been made applicable to winding up proceedings. The word “rules” has been used in this Section as meaning the principles which regulate the affairs of insolvency proceedings.

8.18 Section 109 of Indian Companies Act, 1913 (corresponding to Section 125 of the Companies Act, 1956) applies to a mortgage or charge created by the Company by contract and not to a charge arising by operation of law.

WHAT IS POSITION OF THE SECURED CREDITOR:

8.19 The learned counsel has also relied on the judgment of the Bombay High Court in the case of CANFIN HOMES LTD. VS. LLOYDS STEEL INDUSTRIES LTD. (reported in 106 Com. Cases 52) where the definition of Secured Creditor has been explained. On page 62 of the said judgment the Bombay High Court has observed as under:

“The secured creditor who seeks to prove the whole of his debt in the course of the proceedings of winding up must before he can prove his debt relinquish his security for the benefit of the general body of the creditors. If he surrenders his security for the benefit of the general body of creditors, he may prove the whole of his debt. If the secured creditor has realised his security, he may prove for the balance due to him after deducting the net amount hat has been realised. The stage for relinquishing security arises when a secured creditor seeks to prove the whole of his debt in the course of winding up. If he elects to prove in the course of winding up

the whole of the debt due and owing to him, he has to necessarily surrender his security for the benefit of the general body creditors. Therefore, in my view, it would be wholly inappropriate and inapposite to require the secured creditor at this stage when he files a company petition for winding up to exercise the option of relinquishment his security since that stage does not arise until the debt is to be proved."

8.20 Similar view is also taken by the Bombay High Court in the case of STATE OF MAHARASHTRA VS. OFFICIAL LIQUIDATOR OF THE RELIANCE HEAT TRANSFER PVT. LTD. (IN LIQUIDATION) reported in 120 Comp. Cases 648 where on page 671 the Court has observed as under:

"For the reasons recorded above, all the company applications are partly allowed with direction to the official liquidator to reckon the claim of the State of Maharashtra, as well as

the State of Karnataka, as the case may be, as “secured creditor” of the company in liquidation along with other secured creditors and workers of the company in liquidation on pari passu basis in terms of Section 529A of the Companies Act.”

SUBMISSION OF LEARNED SR. ADVOCATE MR. MIHIR JOSHI WITH SINGHI & CO. ON BEHALF OF RESPONDENT NO. 8 ICICI BANK.

9. Mr. R.M. Desai, learned advocate appears on behalf of the Official Liquidator. Mr. J.T. Trivedi, learned advocate appears on behalf of Bank of India, Mr. Pranav Desai, learned advocate appears on behalf of respondent No. 3. Mr. Mihir Joshi, learned sr. advocate with Singhi & Co. appears on behalf of respondent No. 8, Mr. Vasavada, learned advocate appears on behalf of Textile Labour Association. All the respondents have tried to support the judgment of the learned Single Judge.

9.1 Amongst all these advocates, we must state that on behalf of respondent No. 8 Mr. Mihir Joshi, learned sr. counsel with Singhi and Company appears. He has addressed the Court at length and therefore we will take his submission first.

9.1(a). On behalf of one of the secured creditors Mr. Mihir Joshi, learned sr. counsel appears. He has invited our attention that in this case this Court has given judgment on 30.7.1983 and thereafter in January, 1984. He stated that Sadashiv Pimplaskar, Chief Manager, ICICI has filed affidavit in reply dated 18.7.2005 which is on page 181 of the paper book for which affidavit of IFCI Ltd., 5.9.2005 has been filed. Further affidavit of ICICI dated 26.9.2005 has been filed. He has invited our attention to the affidavit on page 181 of the paper book.

9.2 The learned counsel further submitted that the contention on behalf of ONGC that it has superior right even by the virtue of the order of the Hon'ble Supreme Court including order dated 17.10.1997 is discussed and has been rightly negatived by the learned Single Judge.

9.3 As the learned sr. advocate has made elaborate submissions, we would take up his contentions first. He has invited our attention to the affidavit filed by the Chief Manager of ICICI Ltd. He has referred to various amounts advanced by ICICI Ltd., and other financial institutions right from 24.3.1982. He has stated that in respect of first rupee term loan, the Company has executed a Joint Mortgage Deed dated 20.1.1984 creating a legal mortgage in favour of ICICI Bank Ltd., and IDBI Bank along with IFCI in respect of its immovable properties and movable properties situated at Mithipur, Dist. Ahmedabad,

Rajpur-Hirpur at Baroda. A copy of the said Mortgage Deed was enclosed with the affidavit in reply (produced at page 184 of the paper book). He has relied on the judgment of the Hon'ble Supreme Court in the case of Textile Labour Association Vs. The Official Liquidator reported in 120 Com. Cases 505 wherein the Apex Court on the application of the Textile Labour Association clarified its earlier judgment and order dated 17.10.1997 and observed that the order dated 17.10.1997 will have to be read subject to the provisions of Sections 529 and 529A of the Companies Act.

9.4 The learned counsel further submitted that in Company Application No. 445 of 2000 filed by the ONGC seeking a direction for payment to ONGC out of the sale proceeds available from the sale of the assets/properties of the Company in liquidation, the Company Judge held inter alia that ONGC was not entitled to claim status of a

secured creditor, that ONGC did not have a superior right even above secured creditor by virtue of the order dated 17.10.1997 of the Hon'ble Supreme Court and therefore it could not seek a direction for payment before claims of secured creditors and workmen were processed under Section 529 and 529A of the Companies Act.

9.5 Thereafter on 18.10.2004 ONGC filed the present O.J. Appeal before this Court which was admitted and orders were passed on the Civil Application staying the impugned judgment/order subject to disbursement to the workers at the rate of Rs. 2,500/- to each worker as agreed by the parties.

9.6 The learned counsel for respondent No. 8 has submitted that the contention of the ONGC that it has a superior right even above secured creditors, by virtue of the orders of the Hon'ble Supreme Court of India including the order dated

17.10.1997 is misconceived and has been rightly negatived by the learned Company Judge. In support of this, the learned counsel has made the following submissions:

(a) Supreme Court Bar Association Vs. Union of India and Another reported in (1998) 4 SCC 409 where the Hon'ble Supreme Court has considered the power and scope of Article 142 of the Constitution of India vis-a-vis power under Article 129 of the Constitution.

9.7 He has submitted that the contention of the ONGC that it is a secured creditor by virtue of the purported charge created by the order of the Hon'ble Supreme Court dated 15.4.1987 is similarly misconceived and contrary to the facts and applicable law. In support of the aforesaid, the learned counsel has made the following submissions:

9.8 The order dated 15.4.1987 of the Hon'ble Supreme Court of India does not create a charge on the properties of the Company in favour of ONGC since the order by itself does not make the immovable properties of the Company a security for the payment of money to ONGC particularly since it does not crystallize the liability of the Company whereby the ONGC became entitled to realise a determined sum from the company and neither does the order stipulate that a charge would be created on the properties of the company and that in default of payment of the amount, the ONGC was authorised to apply to the Court for the sale of the company's property and realisation of the decretal amount.

9.9 In fact the said order dated 15.4.1987 is merely an order of injunction restraining the ONGC from disconnecting supply of gas to the company for non-payment of the differential amount of price, on condition that the company

gives an undertaking to the Court as stipulated in the order. The order therefore only stipulates the terms of the undertaking to be submitted by the parties desirous of availing of the benefit of the interim order and the said order does not, by itself, contain any other independent directions or stipulations at all.

9.10 ONGC is only a judgment creditor/decree holder and is not entitled to any preferential rights thereby. This has been expressly stated by the Supreme Court in its judgment dated 12.4.2004 that Section 529A will override all other claims of other creditors even when a decree is passed by the Court. The said statement of law coupled with the direction of the Supreme Court itself that the claims of ONGC will have to be worked out in accordance with Sections 529 and 529A of the Act, which contemplate claims of both secured and unsecured creditors, establish beyond doubt that ONGC cannot be considered as a secured

creditor by virtue of the orders of the Supreme Court.

9.11 The undertaking furnished by the Company dated 27.5.1987 also does not create any charge on the properties of the company in favour of ONGC since no interest in the properties is created in favour of ONGC nor are the properties of the company made a security for payment of money to ONGC. It only brings about a situation whereby the assets of the company would not be disposed of and would be available in the event a liability arose against the company on final adjudication of the dispute. This would be akin to an order of injunction or at the highest an order of attachment contemplated under Order XXXIX and Order XXXVIII respectively of the Code of Civil Procedure whereunder directions can be issued by the Court to ensure that the property is not disposed of and the property or security to the extent of the value thereof as may be

sufficient to satisfy the decree is available at the time of execution of the decree. In such an event therefore the beneficiary of the undertaking does not become a secured creditor since it is well settled that an attaching creditor is not secured creditor and attachment creates no charge in favour of the attaching creditor. In support of the aforesaid contention the learned counsel has relied on the judgment of the Division Bench of the Bombay High Court in the case of Gordhandas Vallabhdas Vs. Official Liquidator reported in AIR 1930 Bombay 16 where the Division Bench (Coram: Marten, C.J. and Murphy, J) wherein on page 18 of the said judgment it has held that attaching creditor is not a secured creditor, an attachment creates no charge in favour of the attaching creditor but it merely prevents and avoids alienation and confers no right on the attaching creditor and further on page 21 of the judgment it is observed as under:

> “Under those circumstances his present application to be treated as a secured creditor in respect of this engine and to be paid out of proceeds of the engine in priority to the other creditors, is misconceived and must be dismissed.”

9.12 In the alternative, if the undertaking furnished by the company is treated as creating a charge on the properties of the company, then in that case it is an undertaking voluntarily given by the company and therefore a charge created by the company which is required to be registered either by the company or by ONGC under Section 125 read with S.134 of the Companies Act, failing which it would be void against the Liquidator or creditors of the company and since such purported charge has not been registered either by the Company or by ONGC, the same is unenforceable.

9.13 In the case of Praga Tools Ltd. Vs. Official Liquidator reported in 56 Company Cases 214), the facts were that there was a direction of the Court for furnishing security as a condition of an order staying publication of the advertisement of the winding up petition. This was claimed to be a charge created by an order of the Court not requiring registration under Section 125 of the Companies Act. This was negatived by the Court holding that the security executed by the company was certainly not by an order of the Court. The Court merely provided for the furnishing of the security which might or might not have been furnished by the company which went into liquidation. As it appeared the security was furnished and that security was within the mischief of Section 125 of the Companies Act.

9.14 However since in the facts of that case the said security was extinguished and a charge

created by the subsequent order of the Court, it was held that such subsequent charge did not require registration. The said judgment has been quoted with approval by the Supreme Court of India in the case of Indian Bank Vs. Official Liquidator, Chemmeens Exports (P) Ltd. Reported in (1998) 5 SCC 401 where the Hon'ble Supreme Court in para 9 after referring to the decision of the Calcutta High Court in the case of Praga Tools Ltd. Vs. Official Liquidator of Bengal Engineering Co. (Pvt.) Ltd. (1984) 56 Comp. Cases 214 has approved the said ratio. In this connection, we have also referred to earlier the judgment of the Calcutta High Court in Praga Tools Ltd. Vs. Official Liquidator (supra) as well as the judgment of the Hon'ble Apex Court (supra) in particular para 9 where the Hon'ble Supreme Court has approved the ratio and therefore we do not repeat the same at this stage. (see: paras 3.17B, 4.1 to 4.4).

9.15 In view of the aforesaid position, the learned advocate has made the following submissions:

9.16 That in any case even if ONGC is held to be a secured creditor, it is not entitled to be ranked pari passu with the other secured creditors and its right would be subject to previously created rights.

9.17 The Contributory Mortgage Deed in favour of ICICI and others is dated 20.01.1984, the order of the Supreme Court of India relied upon by ONGC is dated 15.4.1987 and the undertaking has been furnished by the company on 27.5.1987. The creation of the purported charge in favour of ONGC is therefore subsequent to the mortgage deed in favour of ICICI and others. It is an admitted position that the assets of the company are insufficient to satisfy the dues of the secured creditors. Therefore, under Section 48 of the

Transfer of Property Act, where the rights created by the company cannot be exercised to the full extent together, each later created right would be subject to the rights previously created.

9.18 There is no special contract or reservation binding the earlier transferees and in fact there is an express stipulation in the undertaking furnished by the company that it will not further encumber or alienate its properties which therefore acknowledges previous transfer by way of mortgage in favour of ICICI and others and therefore the ONGC would only be a subservient charge holder.

10. As regard TLA, Mr. Vasavada appears. He has stated that Section 529 and Section 529A has been interpreted by the Hon'ble Supreme Court in various cases. For that he has relied on the decision of the Hon'ble Supreme Court in the case

of UCO Bank Vs. Official Liquidator reported in (1999) 5 SCC 1 in which the Hon'ble Supreme Court has held that the workers have a right to be heard. He has also relied on the judgment of the Hon'ble Supreme Court in the case of A.P. STATE FINANCIAL CORPORATION VS. OFFICIAL LIQUIDATOR reported in (2000) 7 SCC 291 = (2000) 102 Com Cases 1 where also scope of Section 529 has been considered and also the judgment of the Hon'ble Supreme Court in the case of INTERNATIONAL COACH BUILDERS LTD. VS. KARNATAKA STATE FINANCIAL CORPORATION reported in 114 Com. Cases 614. In that case also the Hon'ble Supreme Court considered right of financial institutions which has been conferred on them under the provisions of the Financial Corporations Act vis-a-vis under the provisions of the Companies Act particularly Section 529 and 529A of the Act wherein on page 628 the Hon'ble Court has observed as under:

10.A “We do not really see a conflict between

Section 29 of the SFC Act and the Companies Act at all, since the rights under Section 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in A.P. State Financial Corporation case (supra). This Court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529A of the Companies Act, 1956, inasmuch as the SFCs cannot exercise the right under Section 29 ignoring a pari passu charge of the workmen.

10.B On page 630 of the said judgment the Hon'ble Supreme Court has held as follows:

(1)xxxxxxxxx

(2) The SFCs cannot unilaterally act to realise the mortgaged properties

without the consent of the official liquidator representing workmen for the pari passu charge in their favour under the proviso to Section 529 of the Companies Act, 1956;

(3) If the official liquidator does not consent, the SFCs have to more the company Court for appropriate directions to the official liquidator who is the pari passu charge holder on behalf of the workmen. In any event the official liquidator cannot act without seeking directions from the company Court and under its supervision."

10.1 In view of the last judgment of the Hon'ble Supreme Court in the case of Textile Labour Association (supra) the contentions of ONGC that the previous order of the Hon'ble Supreme Court has not been considered the said arguments cannot be considered. In view of the

above, the contention of the ONGC that it has a superior secured charge cannot remain same. In view of the same, we have to note that the previous orders of the Hon'ble Supreme Court are available to the Hon'ble Supreme Court and the Hon'ble Supreme Court has interpreted those orders in the final judgment and effect of the earlier orders when the Hon'ble Supreme Court has passed recent and detailed judgment.

10.2 We have also considered the submissions of Mr. J.T. Trivedi, learned advocate on behalf of respondent No. 2 Bank of India. He has relied on affidavit dated 20.9.2004 filed by Shri K.K. Nair, Assistant General Manager, Ahmedabad Recovery Branch. From the record it is submitted that Bank of India, one of the Secured Creditors, had filed a Review Petition in the Hon'ble Supreme Court and there were number of Review Petitions filed by different Secured Creditors. This submission was made in context of the

contention raised by the learned Additional Advocate General that a Review Petition filed by ICICI came to be dismissed as withdrawn on 16.10.2001. The learned counsel submitted that Review Petition being I.As. No. 300 to 310 of 2002 were filed by Bank of India and the same came up for hearing on 21.01.2003 wherein notice has been issued and thereafter ONGC has been granted time to file reply. It is submitted that the Review Petition is still pending. Regarding the undertaking filed by the Management of the Company in liquidation before the Hon'ble Supreme Court, it was submitted by the learned counsel that the property in question was already under charge created in favour of the Secured Creditor and if there was any failure/deficiency in filing the said undertaking, it was at the end of the person who filed such an undertaking in not disclosing the pre-existing charge in relation to properties of the Company in liquidation. The learned counsel submitted that in the

circumstances, even if ONGC was to be treated as a Secured Creditor, a question as regards priority would arise as to who amongst Secured Creditors is the first charge holder and who is the next in queue.

10.3 The learned counsel submitted that the legal maxim “actus curiae neminem gravabit” which means an act of the Court shall prejudice no man was applicable in case of not only the workmen but also the Secured Creditors.

SUBMISSION ON BEHALF OF IFCI LTD. (RESPONDENT NO. 12):

10.4 The learned counsel has relied on the affidavit of Shri A.K. Malik, Assistant Manager of IFCI Ltd. He has stated that Ambica Mills (in liquidation) has indebted to IFCI for a sum of Rs. 5,72,71,902/- (Rupees five crore seventy two lakh seventy one thousand nine hundred two) as on 31.7.2005 together with further interest at the

agreed contractual rates from 1.8.2005 till payment or realisation, in respect of the loan facilities granted by IFCI Ltd., to Ambica Mills. It has been stated that IFCI has already granted loan of Rs. 1.25 crore (since reduced to Rs. 112.50 lakhs) out of Rupee Term Loan of Rs. 500 lakhs (since reduced to Rs. 475 lakhs) sanctioned jointly by ICICI Bank Ltd., IDBI Ltd., and IFCI Ltd. (hereinafter referred to as “the first loan”) and further term loan of rs. 81 lakhs out of Rupee Term Loan of Rs. 550 lakhs sanctioned jointly by ICICI Bank, IDBI Ltd., IFCI and IIBI (hereinafter referred to as “the second loan”). In respect of the said sum, IFCI is entitled to receive from the Official Liquidator High Court of Gujarat at Ahmedabad a share out of the sale proceeds lying with Liquidator after the sale of the assets of the Company for the satisfaction of its claim against the Company to the extent of its loan liability and interest thereon at the contractual rates. As regards first and second

loan, the terms and conditions governing the rate of interest, period of repayment, nature of security etc., in respect of first loan and second loan were entered into by Ambica Mills as contained in the Common Loan Agreements dated 24.3.1982 and 8.6.1988. It was further stated by the Company that under the Loan Agreements in respect of the loans together with interest, liquidated damages, premia on prepayment, costs, expenses and all other monies, the Company executed in favour of IFCI Ltd., and others, Deed of Hypothecation dated 24.3.1982 in respect of first loan thereby creating a first charge on all its movable properties, pertaining to the Textile Division and also executed in favour of IFCI Ltd., and others Deed of Hypothecation dated 8.6.1988 in respect of second loan thereby creating a first charge on the whole of its movable properties . The Company also executed Joint Mortgage Deed dated 20.1.1984 to secure the first loan and subsequently created mortgage by

deposit of title deeds to secure the second loan thereby mortgaging on first charge basis, in favour of IFCI Ltd., on all its immovable properties more particularly described in the Third Schedule attached thereto. It is therefore stated that the first loan and second loan were granted by IFCI Ltd., under Project Finance Participation Scheme in participation with ICICI Bank, IDBI Ltd., and IIBI. All the original documents are in the custody of ICICI Bank and hence ICICI Bank may be directed to submit the copies of the aforesaid Deed of Hypothecation dated 24.3.1982 and 8.6.1988 and also the Mortgage Deed dated 20.1.1984 and Memorandum of Entry. The said affidavit was filed on 5.9.2005.

CONCLUSION/FINDINGS:

(i)REGARDING FINDING OF LEARNED SINGLE JUDGE:

11. We have considered the contentions of

the learned counsels for the parties. We have also gone through the affidavit filed by Shri A.K. Malik, Assistant Manager, IFCI Ltd. We have also considered the definition of the term “Secured Creditor” by referring to Stroud's Judicial Dictionary, 5th Edition, Volume No. 5; Black's Law Dictionary, Sixth Edition, P. Ramanatha Aiyar's The Law Lexicon, 2nd Edition 1997.

11.1 We have also considered the final judgment of the Hon'ble Supreme Court and though various earlier orders of the Hon'ble Apex Court which support the contention of the ONGC, in final detailed judgment the Hon'ble Supreme Court held against ONGC and we have to presume that when the Hon'ble Supreme Court has passed final judgment, the Hon'ble Supreme Court has considered its earlier orders and thereafter final order has been made and in the final order the Hon'ble Apex Court has decided that the right

of ONGC is subject to Sections 529 and 529A of the Companies Act.

11.2 We have also considered Section 125 of the Act. In view of the said Act any charge which is not registered as stipulated under section 125 of the Act was void against the Liquidator and any Creditor of the Company. From the record it appears that ONGC has not been able to point out as to whether the so called charge, on the basis of which it was claiming preference as a Secured Creditor, was registered or not and in the light of the failure ONGC should not be treated as a Secured Creditor. All other contentions and submissions made by ONGC will not help the ONGC in view of specific provisions of Section 125 of the Act and the statutory requirement under the said Section. We are of the view that the learned counsel for the appellant is right in contending that prior to order dated 12.4.2004 ONGC had no occasion to make a claim as Secured Creditor in

light of the fact that by virtue of various orders commencing from 15.4.1987 till final judgment made by the Hon'ble Supreme Court ONGC was under a belief that it had a preferential right at the time of disbursement of the funds of the Company in liquidation considering the decisions rendered by the Apex Court in favour of ONGC.

11.3 In view of the aforesaid facts and circumstances of the case, the ONGC was permitted to raise the contention especially in the light of the fact that ONGC specifically based its claim on various orders made by the Hon'ble Supreme Court and did not want to lodge any claim before the Official Liquidator, as categorically stated at the Bar by the learned Additional Advocate General under instructions. We are of the view that the learned counsel is right that ONGC was already held to be entitled to recover its dues from the Company in

liquidation in the light of the fact that ONGC had established before the Hon'ble Apex Court that it had supplied goods for which it was entitled to charge at a higher rate and the consumers having undertaken to discharge such a liability.

11.4 We are also of the view that the learned Single Judge was right in holding that once an order of winding up came to be made on 17.1.1997 in Company Petition No. 121 of 1995 with Company Petition No. 66 of 1998 and others, ONGC was required to either seek leave of the Company Court or obtain orders from the Company Court for the purpose of pursuing its legal remedies in relation to recovery of outstanding.

11.5 We have also considered Sections 446(1), 529 and 529A of the Act. In view of the above provisions of the Act and in view of the last judgment of the Hon'ble Supreme Court in

T.L.A.'s case (supra) we are of the opinion that the learned Single Judge was right in holding that even if ONGC seeks to get itself treated as a Secured Creditor it will have to accept pari passu charge in favour of the Workmen to the extent of workmen's portion and in the light of the clear unambiguous and unequivocal language of the provisions the contention on behalf of the ONGC that it has a superior right even above the Secured Creditor requires to be negated in the light of the judgment of the Hon'ble Supreme Court in the case of Textile Labour Association and Another Vs. Official Liquidator and Another (2004) 9 SCC 741.

11.6 We are also of the view that the learned Single Judge was right in holding that in absence of any statutory provision no such right is available to any creditor once there are specific statutory provisions and rules providing for determination of entitlement of persons from the

estate of an insolvent person.

11.7 We are of the view that Section 529(1) has to be read along with the provisions of Section 529A(1)(b) of the Companies Act. A Secured Creditor keeps himself outside the winding up proceedings as stated in the proviso to Section 529(1) of the Act and seeks to recover his dues from realisation of the security, if he loses part of his security towards workmen's dues, the Secured Creditor gets reimbursed to that extent as a Secured Creditor, with an overriding priority under Section 529A(1)(b) of the Act.

11.8 We are therefore of the view that the learned Single Judge was right in holding that the amount taken away by the Liquidator from the realisation of the security outside winding up by the Secured Creditor is permitted to be recovered or reimbursed out of the monies that may be

realised at the instance of other Creditors and for such reimbursement the Secured Creditor gets priority over all other creditors. Therefore, what the Secured Creditor loses towards workmen's portion out of his security can be claimed by Secured Creditor as a secured amount with priority over other creditors out of other realizations made by other creditors when the Company Court directs disbursement of the funds. But at the same time, position of the Secured Creditor does not improve from what it was originally and the priority of the Secured Creditor would not extend to its entire unrealized sums which might be in excess of the value or the price realised from his security.

11.9 In view of the aforesaid facts and circumstances of the case, we are of the view that the learned Single Judge was right in observing that even on this count ONGC cannot be permitted to seek priority over the Secured

Creditors in light of the statutory Scheme laid down under Sections 529 read with Section 529A of the Act. Even if ONGC is to be treated as Secured creditor ONGC will have to first of all permit a pari passu charge to the extent of workmen's portion from the realisation of its security and only thereafter ONGC will be entitled to make a claim to the extent ONGC has given up the workmen's portion from the realisation of its security and only thereafter ONGC will be entitled to make a claim to the extent ONGC has given up the workmen's portion from the amount realised from its security.

11.10 It may be noted that the learned sr. advocate Mr. Kamal Trivedi has not only tried to assail the judgment of the learned Single Judge but he has tried to submit that in view of the judgment of the Hon'ble Supreme Court a security has been created in favour of ONGC and therefore ONGC may be considered as secured creditor. He

submitted that in this case ONGC has supplied gas much prior to winding up order and therefore there is a valid order of the Hon'ble Supreme Court creating the security. Therefore, the Liquidator must pay first all the amount of ONGC and thereafter if anything is left out the same may be given to the secured creditors and workers. However, after the judgment of the Supreme Court in the case of Textile Labour Association (supra) the learned counsel submitted that when the judgment of the Hon'ble Supreme Court is in favour of ONGC passed in the year 1990 ONGC may be treated as decree holder and it may be considered as secured creditor – a security created by orders of the Court. Alternatively, the learned counsel has submitted that in view of the judgment of the Hon'ble Supreme Court in the case of Textile Labour Association (supra) where the Hon'ble Supreme Court has held that security in favour of ONGC even if created it must be read subject to

Section 529 and 529A of the Companies Act, i.e. ONGC to be paid in pari passu with the workers. The learned counsel further submitted that since the other respondents have stated that ONGC cannot be even termed as a secured creditor because no security has been created in favour of ONGC by the Company and there is no written agreement, there is no document executed like mortgage, charge or even lien and even if the charge is created same is not registered, he has made the alternative submission that they are secured creditor in view of the Insolvency Act and some of the said judgments in support of the same.

11.11 It appears from the record that there is nothing on record to show that ONGC has opted to stay outside winding up proceedings and realise its security. On the contrary, ONGC has approached the Court claiming entire outstanding dues without stating as to whether ONGC intends

to relinquish its security and prove its debts as required under Section 529(1) of the Act. Thus a peculiar situation arises wherein the ONGC is neither ready and willing to relinquish its security nor is ready to opt to realize its security and on exercise of such an option permit the Official Liquidator to enforce pari passu charge in favour of the workmen to the extent of workmen's portion. In other words, ONGC would like the Company Court as well as Division Bench of this Court in appeal to permit ONGC to act beyond the provisions of the Act. If such exercise is not permissible for the Apex Court while exercising powers under Article 142 of the Constitution by no stretch of imagination can it be stated that the Company Court would have any such jurisdiction. Because the Apex Court exercises jurisdiction under Article 142 of the Constitution to do complete justice between the parties, and while doing so ordinarily cannot disregard a statutory provision governing a

subject except for “ironing out the creases”. Such powers cannot be exercised by this Court. The conflicting claims of Secured Creditors, other creditors and the overriding statutory preference qua the workmen and ONGC have to be balanced. We have considered the submissions of Mr. Vasavada, learned counsel, particularly the judgment in the case of A.P. State Financial Corporation Vs. Official Liquidator reported in (2000) 7 SCC 291 and from the said judgment it appears that if the statutory provision in State Financial Corporations Act, 1951 cannot prevail over provisions of the Companies Act, it is not possible to accept the contention raised on behalf of the ONGC that it has any superior right on the basis of orders made by the Hon'ble Apex Court.

11.12 We have earlier noted the facts of the case. It is true that originally the consumers association had challenged the increase

in price by ONGC before this Court and thereafter before the Hon'ble Supreme Court. This controversy has arisen from the order of the Hon'ble Apex Court. At that time it was the duty of the respondent to point out while giving undertaking before the Hon'ble Supreme Court that the properties of the Companies were already charged or mortgaged earlier in favour of the financial institutions. If the said facts were brought to the notice that ONGC has certain rights the Hon'ble Apex Court would have passed certain orders. The ONGC has not invited attention of the Hon'ble Supreme Court and they have only invited the orders of the Apex Court but there are other industries, secured creditors and workers. Be that as it may, as far as we are concerned, it is no doubt true that the management of the Company in liquidation failed and neglected to inform the Hon'ble Supreme Court that the properties were already charged and also winding up proceedings have been initiated.

11.13 In the present case, Sections 529 and 529A of the Act were never under challenge or consideration because neither Secured Creditors nor were workmen party to either proceedings between ONGC and its consumers, or between the Official Liquidator and ONGC.

11.14 From the aforesaid order of the Hon'ble Supreme Court and the undertaking given by the respondent we are of the view that the contention of the appellant that the security is created in favour of the appellant by virtue of the order of the Hon'ble Supreme Court cannot be accepted. We are of the view that various orders of the Hon'ble Supreme Court only show that the consumers will not charge and encumber or alienate any of the immovable assets except with the leave of the Hon'ble Supreme Court and that they will make their immovable assets available for discharging the respective liabilities on

account of difference in the price of the gas supplied during pendency of the appeal as determined by order made by the Court while disposing of the appeals.

11.15 The next contention we have to consider is whether the undertaking given by respondent would amount to mortgage, charge or lien in the property considering definition of “secured creditor” under Section 2(e) of the Provincial Insolvency Act, 1950. It is admittedly not a mortgage. In fact, no specific submission as to whether such undertaking is a mortgage or a charge or a lien was advanced on behalf of ONGC. The question is if it is to be treated as a charge the same has to be specifically registered under Section 125 of the Act in absence of which the same would be void against Liquidator and any Creditor of the Company.

11.16 Though much reliance has been placed

on various orders, however, on the facts of the case we are of the view that the learned Single Judge was right in holding that ONGC has failed to show that there is an instrument by which the charge is created or evidenced and copy thereof verified in the prescribed manner filed with the Registrar of Companies for Registration in the manner required by the Companies Act within 30 days after the date of its creation. The Court exercising jurisdiction as a Company Court in winding up proceedings is bound by the provisions of the Act and the relevant rules. In this situation, we are of the view that it is not possible to state that ONGC has been able to establish that any charge was created in its favour and that such charge had been duly registered as required under the provisions of the Act so as to entitle ONGC to claim status of a Secured Creditor.

11.16A The next point is whether the undertaking

given by the respondent Ambica Mills would amount to lien. In this regard we refer to Section 170 of the Contract Act which provides “lien” as under:

“Lien in its primary sense is a right in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. In this primary sense it is given by law and not by contract. The possession of the goods by the person claiming the right of lien is anterior to its exercise. It is called Bailee's lien. If the said person is not in possession, then the exercise of the right is not possible.”

11.16B Under Section 171 of the Contract Act provides general lien of bankers, factors, wharfingers, attorneys and policy broker – A general lien is the right to retain the property

of another for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained. (Reg: Mulla on Indian Contract Act – 12th Edition, page 1992)

11.16C Under Section 171 of the Contract Act General Lien of bankers and others is provided for. General lien confers on lien holder the right to retain the goods until the payment is made. A banker's lien can properly arise only over things which belong to the customer but which are held by the bank as security. ONGC is neither a bailee nor does it fall in the category of general lien-holder described under Section 171 of the Contract Act.

11.17 Laws of Lien – [Section 49 of The Sale of Goods Act provides termination of lien] – Chapter 5 of The Sale of Goods Act – Section 45

defines “unpaid seller”. Section 46 provides unpaid seller's rights which provides that unpaid seller of goods has a lien on the goods for the price while he is in possession of them, and in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them; and a right of resale as limited by this Act. Section 47 provides seller's lien. Section 49 provides termination of lien which reads as under:-

“49(1) The unpaid seller of goods loses his lien thereon -

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) when the buyer or his agent lawfully obtains possession of the goods;

[c] by waiver thereof.

(2)The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods."

(Re: Pollock & Mulla Sale of Goods Act, 6th Edition, Chapter 5, page 327 relevant page 342)

"Loss of Lien – The seller's lien depends upon possession; hence `when the vendor has given the buyer possession under the contract of sale, all his rights in the goods are completely gone; he must recover the price exactly as he would recover any other debt, and has no longer any claims on the goods sold, superior to those of any other creditor. The delivery and acceptance of possession completes the sale, and gives the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price be unpaid and the buyer insolvent, unless, indeed the whole transaction

is vitiated by actual fraud'. (Blackburn on Sale, third edn. p. 341). Benjamin considered that:

Whenever the property has passed and the goods have reached the actual possession of the buyer, the seller's sole remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt; all special remedies in his favour qua seller are gone. (Benjamin on Sale of Personal Property, eighth edn. p. 829)”

(Re: Pollock & Mulla Sale of Goods Act, 6th Edition, Chapter 5, page 327 relevant page 343)

11.18 Now we also consider what is meant by “secured creditor”.

11.19 In Scots law a secured creditor is one who holds a valid fixed security over property, a floating charge, a lien, or a hypothecation (a limited and exceptional class of security right

over corporeal movables arising without possession). Secured creditors will normally have rights over the property in question preferable to the liquidator (1986 Rule 4.66(6)(a)), but if such creditors wish to submit a claim for any unsecured balance, their securities must be valued and deducted from any claim in the liquidation, and the creditor cannot claim more than the balance." (See: Chapter 90 Winding Up in Scotland, para 90-51, Palmer' Company Law, 24th Edition, page 1585 by C.M. Schmitthoff)

11.20 Halsbury's Law of England, 4th Edition, para 1276 on page 729 Vol. 7 Companies regarding application of Bankruptcy Rules have been explained thus:

11.21 "In the winding up of an insolvent company the respective rights of secured and unsecured creditors, the debts provable and the valuation of annuities and future and contingent

liabilities are regulated by the same rules as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt(Companies Act, 1948, s. 317, re-enacting provisions originally contained in the Supreme court of Judicature Act 1875, s. 10).

11.22 Halsbury's Laws of England, 4th Edition, para 1299 regarding Position of Secured Creditors, page 741 has been given thus:

11.23 “A secured creditor need not prove at all, but may rely on his security. He may pursue the remedies which he possessed before the winding up. If a secured creditor of an insolvent company prove for his debt, the rules in bankruptcy applicable to proofs by secured creditors apply.”

11.23A “Secured Creditors – A creditor who has a

mortgage, charge or lien on the property of the company as security for his debt may either:

(a) sell the property subject to his security and prove in the winding up for the balance of his debt after deducting the amount realised, or

(b) surrender his security to the liquidator and prove for the whole of his debt as an unsecured creditor, or

[c] estimate the value of the property subject to his security, and prove for the balance of his debt after deducting the estimated value, or

(d) rely on his security and not prove in the winding up.

(Re: Penington's Company Law, 5th Edition, page 941)

11.23B "It is thus well established that

once a winding up order is passed the undertaking and the assets of the company pass under the control of the liquidator whose statutory duty is to realise them and to pay from out of the sale proceeds its creditors. Such creditors acquire on such order being passed the right to have the assets realised and distributed among them pari passu. No new rights can thereafter be created and no uncompleted rights can be completed , for doing so would be contrary to the creditors' right to have the proceeds of the assets distributed among them pari passu. But Mr. Sen's argument was that the appellants had acquired under the scheme a vested right to have a second mortgage which could not be nullified by the court passing the winding up order. We cannot accede to this contention for the scheme vested no such right. What it did provide was that in consideration of the company agreeing to execute a second mortgage the appellants and the other Schedule “B” creditors agreed to receive

repayment of debts due to them in the manner provided in the scheme and the agreement of August 16, 1965. On failure of the company to execute the mortgage the consideration for postponement of repayment failed and the monies due to those creditors became immediately payable. It is also not correct to say that the scheme gave any priority to those creditors. Such a priority could result only on the execution of the mortgage which would make them secured creditors."

(Re: M/s. J.K. (Bombay) Private Ltd. Vs. New Kaiser-I-Hind Sp. & Wvg. Co. AIR 1970 SC 1041- page 1058 - para No. 39)

11.24 What is the effect on the creditor after winding up of the Company -

"It may be that before the commencement of the winding up proceedings, if a creditor has

attached the property brought it to Court auction, got it sold and realised his debt, nothing further could be done, unless, by some facts of convincing nature, it can be shown to be a payment which would be fraudulent preference made within six months from the date of the commencement of the winding up or within one year from the commencement of the date of the winding up, if the case falls within the four corners of Section 531A. But when a judgment-creditor has attached the property of the company and thereafter a winding up order is made without any further step being taken by such judgment-creditor, he would unquestionably be an unsecured creditor, like any other unsecured creditor, who had neither filed a suit nor obtained a decree nor attached the property."

(Re: ANANTA MILLS LTD. VS. CITY DEPUTY COLLECTOR reported in 42 Com. Cases 476 in which this Court (Coram: D.A. Desai, J) has observed on pages 483-484)

11.25 Actus Curle Neminem Gravabit - An act of the Court shall prejudice no man. This maxim “is founded upon justice and good sense; and affords a safe and certain guide for the administration of law”. In virtue of it, where a case stands over for argument on account of the multiplicity of business in the Court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case; and, therefore, if one party to an action dies during a curia advisari vult, judgment may be entered nunc pro tunc, for the delay is the act of the Court, for which neither party should suffer. (Re: Broom's Legal Maxims, 10th Edition, The Mode of Administering Justice, page 73)

11.26 The learned counsel for the banks have relied on the judgment of the Hon'ble

Supreme Court in the case of Allahabad Bank Vs. Canara Bank and another reported in (2000) 4 SCC 406 where the Hon'ble Supreme Court has considered the provisions of Companies Act and the DRT Act and made certain observations in relation to provisions of Section 529A. However, we must at this stage take into consideration the recent judgment of the Hon'ble Supreme Court in the case of ANDHRA BANK VS. OFFICIAL LIQUIDATOR reported in (2005) 5 SCC 75 where the Hon'ble Supreme Court has explained after considering the provisions of Sections 529-A, 529 and 446 of the Companies Act and inter se priority between “workmen's dues” and debts due to secured creditors and also also considering its earlier judgment in Allahabad Bank Vs. Canara Bank (supra), in paragraph No. 23 on pages 86-87 as under:

“The language of Section 529A is also clear and unequivocal, in terms whereof the workmen's

dues or the debts due to the secured creditors, to the extent such debts under clause [c] of the proviso to sub-section (1) of Section 529 pari passu with such dues, shall have priority over all other debts. Once the workmen's portion is worked out in terms of proviso [c] of sub-section (1) of Section 529, indisputably the claims of the workmen as also the secured creditors will have to be paid in terms of Section 529-A".

11.27 After referring to its judgment in the case of Allahabad Bank (supra) the Hon'ble Supreme Court has further observed in paragraph Nos. 24, 25 and 26 on pages 87-88 as follows:

"para 24 – This Court emphasised that whatever the secured creditor loses towards the workmen's portion out of the security, he can claim the same amount with priority over such unsecured creditors out of realisation made by other creditors whose moneys are lying in the

Tribunal.

Para 25 – While determining point (6), however, a stray observation was made to the effect that the “workmen's dues” have priority over all other creditors, secured and unsecured because of Section 529A(1)(a). Such a question did not arise in the case as Allahabad Bank was indisputably an unsecured creditor.

Para 26 – Such an observation was, thus, neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and unambiguous language contained in Section 529A(1)(a). We have, therefore, no hesitation in holding that finding of this Court in Allahabad Bank to the aforementioned extent does not lay down the correct law.

11.28 In view of the same, ONGC having failed

to establish any lien it cannot be treated as a Secured Creditor even on this count. The dictionary meaning on which reliance is placed is either in context of the Bankruptcy Act or the Provincial Insolvency Act and hence again in context of the three terms: mortgage, charge, lien, which have already been examined hereinbefore.

11.29 In view of this once ONGC is held to be not a Secured Creditor it will have to make its claim in accordance with the provisions of the Act as applicable to other Creditors and cannot seek any preferential treatment. To sum up ONGC is not entitled to seek a position superior to that of Secured Creditors nor is ONGC a Secured Creditor in light of the facts and circumstances available on record. For that we rely on the judgment of the Hon'ble Supreme Court in the case of Textile Labour Association (supra).

11.30 The judgment of the Apex Court which we have extracted earlier states that the claim under Section 529A of the Workmen and the Secured Creditors would override such preferential claim under Section 530 even if the claim of ONGC is treated as preferential claim under Section 530. As a consequence the claims of ONGC are to be worked out in accordance with Sections 529 and 529A of the Act and the use of the words “as well” denotes that the same will fall in the category of all other claims of other creditors even where a decree has been passed by the Court. In the conclusion when the Apex Court observed that the order of 17.10.1997 will have to be read subject to provisions of Sections 529 and 529A of the Act, it only means that as first step the Secured Creditors will have to exercise the option as envisaged under Section 529 of the Act; as second step in case the Secured Creditors opt to stay out of winding up the Official Liquidator

will enforce the pari passu charge to the extent of workmen's portion; and third step the Secured Creditors would be entitled to stake a claim in priority by virtue of provisions of section 529A(1)(b) of the Act and the last step would be all other claims of other creditors, including decree holders, would be required to be discharged subject to availability of the funds.

11.31 In the aforesaid facts and circumstances of the case we are of the view that if the ONGC is a Secured Creditor or has a preference qua all other claimants i.e. Secured Creditors and workmen – in the order dated 12.4.2004 in case of Textile Labour Association (supra) the Hon'ble Apex Court would have made such a declaration instead of the statement that claims, if any, of ONGC will have to be processed in light of provisions of Section 529 and 529A of the Act. The claim which has been made by the ONGC has already been answered by the learned Single Judge

and therefore we cannot give any order.

11.32 We are of the view that ONGC cannot claim any preferential right on the basis of the order of 17.10.1997 in priority to the Secured Creditors and the workmen taking into consideration the provisions of Section 529 and 529A of the Act. Such preferential claim, if falling under Section 530 of the Act would follow the claims of Secured Creditors and the Workmen under Sections 529 & 529A of the Act. In case the claim of ONGC is not proved to be preferential under Section 530 of the Act they would fall for consideration along with all other claims of other Creditors as ONGC, on its own saying, is a decree holder.

11.33 In view of the aforesaid facts and circumstances the Company Application No. 445 of 2000 in Company Petition No. 121 of 1995 filed before this Court praying that this Court may

direct the respondent to make payment to the applicant ONGC towards outstanding dues of Rs. 1799.367 lakhs dated 28.2.1998 with further interest thereupon till the date of payment/till the date of realisation for natural gas supplied to M/s. Ambica Mills Company Limited (in liquidation) cannot be granted at this stage i.e. before the claims of Secured Creditors and workmen are processed under Sections 529 and 529A of the Act. From the record it appears that ONGC did not want to lodge any claim before the Official Liquidator, it will be open to ONGC to lodge its claim in accordance with law and seek its satisfaction when claims of other creditors of the company in liquidation are taken up for consideration for distribution of the funds which may be available at that time.

11.34 In view of the submissions which we have noted we have to consider what is definition of secured creditors and whether ONGC falls

within the term “secured creditors”.

11.35 The net result of the orders passed by the Hon'ble Supreme Court and also of the facts on record is as under:

(1)A direction is given that dues of ONGC should be paid first and no further direction is given for securing this payment presumably because the fact that the immovable properties of Ambica Mills were encumbered in favour of banks at earlier point of time was brought to the notice of the Hon'ble Supreme Court.

(2)The undertaking given by Ambica Mills not to create any further charge or to transfer the immovable properties has been accepted by the Hon'ble Supreme Court.

(3)The order passed by the Hon'ble Supreme Court on 17.10.1997 is to be read subject to the provisions of Section 529 and 529A of the Companies Act in view of the judgment in the

case of Textile Labour Association (supra).

11.36 Admittedly, no charge is created on the properties of Ambica Mills for securing the dues of ONGC. The giving of the above-referred undertaking cannot amount to the creation of any such charge. The giving of it and the acceptance thereof by the Hon'ble Supreme Court only injuncts Ambica Mills from creating any further charge on its properties or transferring the same.

11.37 As per the Black's Law Dictionary, 6th Edition, at page 1355 the term “security” is usually applied to an obligation, pledge, mortgage, deposit, lien etc. given by a debtor in order to assure the payment or performance of his debt, by furnishing to the creditor with a resource to be used in case of failure in the principal obligation. No such security is given by Ambica Mills to ONGC nor any such security is

created by the Hon'ble Supreme Court by any of its orders. On the contrary, by its order dated 12.4.2004 referred to above (Textile Labour Association) (supra), it has made the said orders to be read subject to Sections 529 and 529A of the Companies Act. As stated above, only an undertaking is given by Ambica Mills that it will not further encumber its immovable properties. It should be kept in mind that every assurance does not make a creditor a secured creditor and every promise to pay does not create a security. If a person issues a promissory note and agrees in writing that he will not sell or otherwise create any interest in his properties in favour of the third parties till he has paid the amount of the promissory note, it does not make the creditor a secured creditor. The instant case is similar to such a case. The question to be answered is whether there is any security as contemplated by Sections 529 and 529A of the Companies Act. The simple answer is there is no such security. The

very language of Section 529 contemplates the security of the kind mentioned in the Black's Law Dictionary as quoted hereinabove. There is nothing given by Ambica Mills or even the Hon'ble Supreme Court to assure the payment or performance of the debt of Ambica Mills on which ONGC can fall back in the event of its failure to perform the principal obligation.

11.38 In the above Dictionary, at page 1354, it is stated that “secured creditor” means a creditor who holds some special pecuniary assurance of payment of his debt, such as a mortgage, collateral or lien. ONGC does not hold any such assurance from Ambica Mills.

12. In view of the same, we are of the opinion that the finding, conclusion arrived at and reasoning given by the learned Single Judge do not require interference by this Court, and

the appeal is dismissed accordingly with no order as to costs.

(R.S. GARG, J)

(K.M. MEHTA, J)

(pkn)

After the pronouncement of this judgment, Mr. Ajay R. Mehta, learned advocate appearing for O.N.G.C. - appellant requested this Court to stay implementation of this order for a period of eight weeks. He states that by the order dated 18.10.2004 a Division Bench of this Court has granted ad-interim stay of the impugned orders subject to disbursement to the workers at the rate of Rs. 2500/- per each worker as agreed to by the learned counsel subject to the outcome of the appeal. The said order dated 18.10.2004 passed by the Division Bench of this Court will

continue for a period of eight weeks from today.

(R.S. GARG, J)

Date: 16.1.2006 (K.M. MEHTA, J)